BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

Docket No. 2017-292-WS

IN RE:	)	
	)	**MEMORANDUM IN OPPOSITION**
Application of Carolina Water Service,	)	**TO CAROLINA WATER**
Inc. for Adjustment of Rates and	)	**SERVICE, INC.'S PETITION FOR**
Charges and Modification to Certain	)	**REHEARING OR RECONSIDERATION**
Terms and Conditions for the Provision	)	
of Water and Sewer Service	)	

The Office of Regulatory Staff ("ORS") respectfully submits this Memorandum in Opposition to Carolina Water Service, Inc. ("CWS" or "Company") Petition for Rehearing or Reconsideration. The Commission ruled properly in its Order on Reconsideration that CWS customers should not be responsible for CWS decisions that failed to "minimize costs" as required by the South Carolina Supreme Court and failed to operate "in good faith" as noted by Judge Seymore in order to comply with all applicable laws and regulations. CWS has provided the Commission with no sound regulatory or legal basis to force its customers to pay for its own repeated management mistakes and decisions.

REGULATORY BACKGROUND

This contested rate case matter was first filed with the Commission in November 2017 when CWS filed for a rate increase. Following discovery and a Commission hearing, the Commission issued Order No. 2018-345 granting partial rate relief to CWS. ORS timely filed a Petition for Rehearing or Reconsideration in June 2018. That ORS Petition requested that the Commission reconsider its rulings on six contested matters including allowing CWS to recover its litigation expenses from the lawsuit filed by the Congaree Riverkeeper, Inc. in 2015 against CWS

in federal district court. The Commission granted rehearing to ORS on four of the six issues identified by ORS. After rehearing, the Commission issued Order No. 2018-802 adopting the ORS position that CWS should not be authorized to recover from its customers $416,093 in litigation expenses resulting from its unsuccessful defense of the Riverkeeper lawsuit.

The federal district court ruled that CWS committed 23 violations of the federal Clean Water Act ("CWA") through unlawful discharges into the Saluda River from its I-20 Waste Water Treatment Plant ("WWTP") and ordered CWS to pay a penalty of $23,000 to the United States Treasury. The federal district court ordered CWS to connect its I-20 Waste Water Treatment Plant ("WWTP") with the regional treatment plant as required in its original CWS DHEC NPDES Permit No. SC0035564 issued in 1994 ("NPDES Permit").

In 2018, CWS timely filed for rehearing or reconsideration of the Commission ruling denying the CWS request to include the Riverkeeper legal expenses in CWS customer rates. CWS also filed an appeal in 2019 with the South Carolina Supreme Court. The Supreme Court recently dismissed the CWS appeal and remanded this matter back to the Commission to review its rate making treatment of the CWS Riverkeeper lawsuit legal expenses. CWS filed its latest memorandum in support of its Petition for Reconsideration or Rehearing with the Commission on May 21, 2019.

BRIEF OVERVIEW OF THE RIVERKEEPER/CWS LITIGATION

The Riverkeeper litigation against CWS was filed on January 14, 2015 in the federal district court of South Carolina. The Riverkeeper lawsuit alleged that CWS violated the CWA in three different causes of action. The Riverkeeper agreed to drop one of the allegations in its pleading early in the litigation. The Riverkeeper asserted in its remaining two causes of action that CWS failed to timely connect its I-20 WWTP with a regional system as specifically required

in the NPDES Permit. Notably, the NPDES Permit expressly provided that the CWS I-20 WWTP "**is considered a temporary treatment facility** that will be closed out when the regional sewer system is constructed and available." EC No.57-1 (emphasis added). The Riverkeeper also alleged that the CWS I-20 WWTP made ongoing and unlawful waste discharges over the years into the Saluda River in violation of the NPDES Permit's waste discharge limitations.

For years after receiving the NPDES Permit, CWS management failed to craft and implement a successful interconnection agreement with the Town of Lexington as expressly required by the NPDES Permit. Despite the express terms of its NPDES permit, CWS was never successful in having the I-20 temporary treatment facility designated as a "permanent treatment facility." The inconsistent conduct and ongoing violations of the Clean Water Act by CWS management ultimately led Judge Seymour to observe on summary judgment that "**defendant did not engage in negotiations with Town (Lexington) after the denial by the PSC in 2003 until 2014, after Plaintiff (Riverkeeper) served its notice of intent to sue under the CWA.** Federal District Court Order page 7. (emphasis added). See, also, ECF No. 58-1 at 8.

The "benefits" now claimed by CWS relating its recent settlement with the Riverkeeper are the very same actions and benefits that CWS has been **required** to seek since it received the NPDES Permit from DHEC in 1994. After an 11-year hiatus between 2003 and 2014, CWS management was forced to again seek to connect its I-20 WWTP with the Regional System only **after** the Riverkeeper advised CWS that it intended to sue in 2014. CWS management alone made the decision to wait 11 years between 2003 and 2014 before even attempting to comply with its legal obligations under the CWA and the express terms of its NPDES Permit. CWS customers were not involved in the ongoing and failed CWS management decisions resulting in unlawful and ongoing discharges from the CWS I-20 WWTP and failure to connect to the Regional System. An

agreement by the Riverkeeper not to sue for five years is essentially meaningless since CWS agreed, because of the successful Riverkeeper lawsuit, to take the required steps to comply with the CWA and the terms of the NPDES Permit.

CWS customers should be not be forced by the Commission to pay for CWS's legal costs for its ongoing management failures to comply with the Clean Water Act. The Commission properly found and ruled that such legal costs did not benefit CWS customers and that those legal expenses should be the sole responsibility of shareholders and not CWS customers. CWS has not provided the Commission with any lawful basis or with evidence necessary to support a reconsideration of its ruling protecting CWS customers.

THE CWS/RIVERKEEPER SETTLEMENT AGREEMENT DOES NOT ALTER OR AMEND THE FEDERAL DISTRICT COURT ORDER FINDING CWS REPEATEDLY VIOLATED THE CLEAN WATER ACT AND ITS NPDES PERMIT OR ELIMINATE THE COURT MANDATED PENALTY OF $23,000

CWS requests that the Commission reconsider its ruling to not allow CWS to charge its customers for its unsuccessful legal defense costs of the federal district court lawsuit brought by the Riverkeeper. CWS asserts that its Settlement Agreement with the Riverkeeper provides certain customer "benefits" that now justify Commission approval for CWS to include $416,093 in litigation costs in customer rates. CWS makes this highly dubious claim even though CWS was not successful in defending against the CWA claims asserted by the Riverkeeper. CWS's memoranda fail to provide any substantive basis to the Commission as to why its customers should now be responsible for the multi-decade failures of management to timely connect its I-20 WWTP to the regional system as required in its NPDES Permit.

The Riverkeeper lawsuit was the direct result of CWS management failing to maintain ongoing compliance with its NPDES permit and state and federal law requirements over

substantial periods of time. The Commission's rules and regulations require CWS to maintain operating compliance with local, state and federal statutes and regulations at all times. (*See, e.g.*, S.C. Code Regs. Ann. 103-700(B)). The existing record evidence demonstrates that CWS failed to comply with the Commission-required operating standards and conduct. During the 2018 Commission rehearing proceeding, ORS witness Hipp testified that the Riverkeeper legal expenses should not be paid by CWS customer since CWS's management failed to operate its I-20 WWTP in accordance with the express terms of its NPDES Permit. Hipp testified that:

> "The ratepayers receive no economic benefit from Judge Seymour's Order which held that CWS violated its environmental permit and imposed serious and costly penalties. As a regulated utility with a defined service territory, CWS is required to provide adequate and efficient service at just and reasonable rates. The ratepayer pays for utility service which includes the reasonable expectation the Company's business practices and operations comply with federal, state and local laws. Because the Company's operations did not deliver service in compliance with federal and state environmental laws, the ratepayers could not be assessed the penalties, or the litigation costs related to the CRK case." Rehearing Transcript at p. 389, l. 12 to 20.

CWS customers had no input or involvement regarding the series of flawed managerial judgments that resulted in CWS's ongoing failure to connect its I-20 WWTP to the regional system. As Judge Seymour stated in her order, the DHEC Permit imposed specific obligations on CWS:

> "The Permit puts the onus on Defendant to provide a satisfactory agreement for PSC's approval. The prior denials demonstrate what the PSC will find acceptable in a proposed agreement. Further, Defendant has the obligation to contract with Town or take other measures to fulfill the Permit requirements. Defendant has kept its plant open **for seventeen years after** it was required to connect. While regional connection does require other actors' assistance and approval, **Defendant cannot be rewarded for its lack of a good faith effort** to engage in negotiations and receive the required approvals." Federal District Court Order at p. 14. (Emphasis added.)

CWS FAILED TO TAKE ACTIONS REQUIRED TO MINIMIZE OPERATING COSTS

The South Carolina Supreme Court has provided the Commission with clear guidance on how to address this operational matter. In an electric case appeal, the Court reversed a decision by the Commission to allow Carolina Power & Light to recover in customer rates the costs of CP&L's management failure to ensure full compliance with NRC operating and construction standards and requirements. CP&L failed to confirm that 96 seismic pipe supports installed in a CP&L nuclear generating station met NRC standards. Upon discovery of the improper installation of the pipe supports by NRC, CP&L was required to shut the nuclear generating station down a second time to correct and repair the improperly installed pipe supports. CP&L incurred an additional $1 million in fuel costs during the second shutdown due to its own failure to confirm that the pipe supports were properly installed in the first place. Hamm v. PSC and CP&L, 291 S.C. 1190, 352 S.E.2d 476 (1987). The Supreme Court noted that the Commission decision to allow CP&L to recover those additional costs from ratepayers due to the company failure to comply with NRC operating requirements created "**no incentive to minimize costs**". Id. In the same manner, any approval by the Commission in this matter to force CWS customers to pay for years of poor CWS management actions and decisions resulting in ongoing violations of the Clean Water Act and related legal defense costs eliminates any CWS operating incentives "to minimize costs." The Commission ruled properly in its Order on Reconsideration and should reject the CWS efforts to burden its customers with the costs of its own management failures to comply with applicable operations law regarding its I-20 waste treatment plant.

The CWS Settlement Agreement is irrelevant to assignment of litigation costs. The "settlement" presented to the Commission in this rehearing in no way alters review of this matter. The settlement simply requires CWS having to engage in actions and conduct to comply fully with

the long-standing Clean Water Act requirements and the express terms of the NPDES Permit. CWS was always required to comply with the CWA and its NPDES Permit. CWS management's failure to comply with those existing regulatory requirements rests solely on the shoulders of CWS management. The resulting legal and litigation costs should not be imposed now by the Commission on CWS customers due to a "settlement agreement." CWS must understand that it has an ongoing responsibility to "minimize costs." CWS management failed to adhere to that basic and important legal and regulatory requirement. Only CWS management and its shareholders should be responsible for paying the legal and litigation costs of ongoing mistakes and failure to timely comply for many years with all applicable laws, regulations and operating permits.

CWS FAILED TO ACT IN GOOD FAITH

The eleven-year span between 2003 and 2014 when CWS failed to contact the Town of Lexington to negotiate for connection with the Regional System reflects a serious "lack of good faith effort" on the part of CWS. Federal District Court Order at p.14. Taking no formal action over those eleven years to proceed with its NPDES requirement to connect with the Regional System serves as a serious indictment of CWS management compliance decisions. That lack of good faith management effort serves as the foundation of the legal defense costs CWS now seeks to impose on its customers. That same conduct demonstrates CWS failed to "minimize costs" as required by the South Carolina Supreme Court. The failure to act for eleven years to try to connect to the Regional System and its failure to act in good faith, as noted by Judge Seymour, cannot serve as an appropriate Commission basis to burden CWS customers with the resulting legal costs. CWS management and shareholders should accept responsibility and pay the resulting costs of years of poor management conduct and operations.

CONCLUSION

The Commission ruled properly in its 2018 Order on Reconsideration that CWS customers should not be responsible for payment of CWS defense litigation costs in the Riverkeeper litigation. CWS management made decisions that failed to "minimize costs" and failed to operate "in good faith" in compliance with all applicable laws and regulations. CWS has not engaged in any conduct that merits a reward from the Commission in the Riverkeeper litigation. The Settlement Agreement added nothing to CWS's preexisting obligations to comply with the law. The Commission should uphold its 2018 Order on Reconsideration and reject the self-serving request by CWS to transfer the legal defense costs of repeated management failures to the customers of CWS.

Respectfully submitted and dated this 6th day of June 2019.

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